

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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WILLIAM TERRELL, Guardian Ad
Litem for QUENTIN SLAGOWSKI, a
minor; ANIKA SLAGOWSKI, a minor;
and ROWAN SLAGOWSKI,

Plaintiffs,

v.

CENTRAL WASHINGTON ASPHALT, INC.;
DONALD HANNON; JAMES WENTLAND;
and JERRY GOLDSMITH,

Defendants.

AND ALL RELATED MATTERS.

Case No. 2:11-cv-00142-APG-VCF

**ORDER (1) GRANTING MOTION TO
STRIKE, (2) DENYING MOTION FOR
LEAVE TO FILE EXCESS PAGES,
AND (3) DENYING ZEMKE MOTION
FOR SUMMARY JUDGMENT**

(Dkt. #428, #475, #477)

This lawsuit arises out of a serious car accident. Plaintiff/third party defendant Mitchell Zemke, one of the drivers involved in the accident, moves for summary judgment on the claims asserted against him by defendants/third party plaintiffs Central Washington Asphalt, Inc., Donald Hannon, James Wentland, and Jerry Goldsmith (together, the "CW Defendants"). The CW Defendants were sued by Doreen and Phillip Law and others, who alleged the CW Defendants caused the accident in which the Laws were injured. (Dkt. #330.) Eventually, the CW Defendants entered into settlement agreements with the Laws. The CW Defendants assert third party claims for contribution and equitable indemnity against Zemke based on their contention that he caused or contributed to the accident. Zemke also moves for leave to exceed the page limit in his reply brief. The CW Defendants move to strike portions of Zemke's reply brief because they argue it raises new issues not addressed in the summary judgment motion.

I set out the basic background facts of the car accident in a prior order (Dkt. #445) and the parties are familiar with the facts, so I will not repeat them here except where necessary. I grant the motion to strike and I will not consider the new arguments Zemke raises for the first time in

1 his reply brief. I deny Zemke's motion for leave to exceed the page limit because the excess
2 pages would not have been necessary if Zemke had not raised new issues in his reply brief. I
3 deny Zemke's motion for summary judgment because issues of fact remain regarding the CW
4 Defendants' contribution and equitable indemnity claims against him.

5 **I. MOTION TO STRIKE (Dkt. #477) AND MOTION TO EXCEED PAGE LIMIT (Dkt.**
6 **#475)**

7 The CW Defendants move to strike Zemke's reply brief because they argue it exceeds the
8 page limit and raises new issues. The CW Defendants request that I strike the new arguments
9 raised in reply. Alternatively, they request leave to file a "sur-opposition" to Zemke's reply.
10 Zemke does not oppose the request to file a sur-opposition.

11 In his reply brief, Zemke raises new arguments for the first time. He argues there are only
12 two versions of the accident, both of which involve intentional conduct on the part of either
13 Hannon or Fenton. He contends either version would relieve him of liability because the
14 intentional conduct was a superseding cause that was unforeseeable to Zemke, and he requests
15 judgment be entered in his favor on this basis.¹ Second, in his motion he argues that the CW
16 Defendants cannot pursue him for contribution because their settlements with the Laws did not
17 extinguish his liability, which is required in order for Zemke to have to contribute to paying that
18 settlement under the relevant Nevada statute. In his reply, he argues for the first time that his
19 liability had already been extinguished by operation of the statute of limitations (rather than by
20 the settlements), and that the Laws did not intend to release Zemke through the settlement, as
21 demonstrated by communication between his counsel and the Laws' counsel.

22 I decline to consider arguments raised for the first time in a reply brief. *7912 Limbwood*
23 *Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1152-53 (D. Nev. 2013) (citing
24 *Carstarphen v. Milsner*, 594 F. Supp. 2d 1201, 1204 n.1 (D. Nev. 2009)). Zemke's argument that
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26 ¹ Even if I considered this argument, I would reject it. Assuming Hannon and/or Fenton engaged
27 in intentional conduct, Zemke still owed a duty to avoid an accident, if possible, even if other drivers
28 wrongly failed to yield the right of way. For the reasons discussed in my prior Order, issues of fact remain
on the question of whether Zemke violated a duty of care. (Dkt. #445.)

1 there are only two versions of the accident, either of which relieve him of liability, is not a fair
2 response to the CW Defendants' opposition. Instead, it is a new argument which seeks judgment
3 as a matter of law after the dispositive motion deadline expired. His argument that his liability
4 was extinguished based on the statute of limitations rather than the settlement agreement also is a
5 new argument that could and should have been raised in his motion. Finally, he could and should
6 have presented in his original motion evidence about the Laws' counsel's prior communications
7 about the parties' alleged intentions. While this last argument perhaps is a fair response to the
8 CW Defendants' opposition, it would not change the result because the settlement agreements are
9 unambiguous, as discussed below.

10 I therefore grant the CW Defendants' motion to strike and I will not consider the
11 arguments raised for the first time in the reply brief. I deny Zemke's motion to exceed the page
12 limit because he would not have needed the excess pages if he did not raise new issues.

13 **II. MOTION FOR SUMMARY JUDGMENT (Dkt. #428)**

14 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits
15 demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to
16 judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the
17 outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
18 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict
19 for the nonmoving party." *Id.*

20 The party seeking summary judgment bears the initial burden of informing the court of the
21 basis for its motion and identifying those portions of the record that demonstrate the absence of a
22 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden
23 then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine
24 issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.
25 2000). I view the evidence and reasonable inferences in the light most favorable to the non-
26 moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

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1 **A. Contribution**

2 Zemke argues that he does not owe the CW Defendants contribution for the Laws' claims
3 against them because there is no common law claim for contribution among joint tortfeasors.

4 Zemke also argues the CW Defendants are not entitled to contribution under Nevada Revised
5 Statutes § 17.225 because (1) the CW Defendants are intentional tortfeasors, (2) Zemke was not
6 released by the settlement between the Laws and the CW Defendants, and (3) the CW Defendants
7 released only their own liability in the settlement and thus did not pay more than their fair share.

8 The CW Defendants respond that the Laws' allegations in their complaint do not establish
9 that the CW Defendants are intentional tortfeasors and Zemke did not establish that no genuine
10 issue of fact remains on that question. As to Zemke's argument that § 17.225 was not satisfied,
11 they argue that Zemke was released under the settlement agreements' plain language. The CW
12 Defendants also argue that Zemke has not established that no genuine dispute remains that the
13 CW Defendants paid only their fair share.

14 A contribution claim is created by statute. *The Doctors Co. v. Vincent*, 98 P.3d 681, 686
15 (Nev. 2004). Pursuant to Nevada Revised Statutes § 17.225(1), "where two or more persons
16 become jointly or severally liable in tort for the same injury to person or property or for the same
17 wrongful death, there is a right of contribution among them even though judgment has not been
18 recovered against all or any of them." Under Nevada's statutory provisions, "the remedy of
19 contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured
20 party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the
21 settling or discharging tortfeasor's equitable share of the common liability." *The Doctors Co.*, 98
22 P.3d at 690. The legislative intent behind the statutory scheme is "to promote and encourage
23 settlements among joint defendants." *Otak Nev., L.L.C. v. Eight Jud. Dist. Ct.*, 312 P.3d 491, 498
24 (Nev. 2013) (en banc) (quotation omitted).

25 To recover on a contribution claim, a tortfeasor must show that he or she "has paid more
26 than his or her equitable share of the common liability, and the tortfeasor's total recovery is
27 limited to the amount paid by the tortfeasor in excess of his or her equitable share." Nev. Rev.
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1 Stat. § 17.225(2). Whether the settling tortfeasor paid more than his or her fair share is a question
2 of fact. *The Doctors Co.*, 98 P.3d at 690.

3 Additionally, the settling tortfeasor “is not entitled to recover contribution from another
4 tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement
5 nor in respect to any amount paid in a settlement which is in excess of what was reasonable.”
6 Nev. Rev. Stat. § 17.225(3). When one tortfeasor settles with the injured party and obtains a
7 release, that release “does not discharge any of the other tortfeasors from liability for the injury or
8 wrongful death unless its terms so provide” *Id.* at § 17.245(1)(a); *The Doctors Co.*, 98 P.3d
9 at 687 (holding that the settling tortfeasor’s concession that its settlement did not extinguish a
10 joint tortfeasor’s liability was fatal to its contribution claim). Finally, “no right of contribution
11 exists in favor of any tortfeasor who has intentionally caused or contributed to the injury
12 sustained.” *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1051 (Nev. 2000) (en banc) (citing
13 Nev. Rev. Stat. § 17.255).

14 1. *Intentional Tortfeasor*

15 Zemke first argues the CW Defendants are not entitled to contribution because they are
16 intentional tortfeasors. Although the Laws alleged in their complaint that the CW Defendants
17 engaged in intentional conduct, they also alleged the CW Defendants were negligent. (Dkt. #330.)
18 No jury has found the CW Defendants engaged in intentional conduct and there is no evidence
19 that the CW Defendants admitted to intentional conduct in settling with the Laws. (See Dkt. #467-
20 5 (declaration from the Laws’ counsel stating none of the settlement proceeds constituted
21 payment for punitive damages); Dkt. #467-6 at 5 (settlement agreement stating the settling parties
22 do not admit liability and they deny liability); Dkt. #467-7 at 5 (same).) I therefore deny Zemke’s
23 motion on this basis.

24 2. *Extinguishing Zemke’s Liability*

25 Zemke argues his liability was not extinguished in the settlement between the Laws and
26 the CW Defendants and therefore the CW Defendants did not perfect their right to contribution
27 against him. The only evidence Zemke cites in support of this argument are the settlement
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1 agreements which, he argues, do not mention him by name. (*See* Dkt. #428 at 5, 9.) He contends
2 the boilerplate language in the settlement agreements does not suffice to release him. He also
3 contends the Laws did not believe Zemke caused or contributed to the accident. (*Id.*)

4 The CW Defendants respond that the settlement agreements' plain language shows the
5 Laws specifically and expressly released Zemke because the agreements release any third party
6 defendant named in the lawsuit, which includes Zemke. They contend this language in the
7 agreements is not boilerplate and refers specifically to Zemke. As to the Laws' belief about
8 whether Zemke caused the accident, the CW Defendants argue that injured parties often release
9 persons they do not necessarily believe caused or contributed to causing the accident, such as
10 spouses or heirs. Finally, the CW Defendants present the declaration of the Laws' attorney as
11 evidence of the Laws' intent.

12 Under Nevada law, a release obtained by one tortfeasor does not discharge other
13 tortfeasors unless the release's terms provide otherwise. Nev. Rev. Stat. § 17.245. The injured
14 party's intention to release a non-settling joint tortfeasor must be "manifest." *Russ v. Gen. Motors*
15 *Corp.*, 906 P.2d 718, 721 (Nev. 1995). A release need not specifically name other tortfeasors to
16 establish that the release extinguished the other tortfeasors' liability. *Id.* at 721-22. However, a
17 boilerplate release discharges an unnamed tortfeasor only if the parties to the release intended that
18 result. *Id.* at 721. Intent usually is a fact question for the jury. *Id.* at 722.

19 Zemke fails to meet his initial burden of showing he is entitled to judgment as a matter of
20 law. In his motion, he presents no evidence of whether the Laws intended to extinguish his
21 liability other than the agreements and the fact that the Laws blamed Hannon, not Zemke, for
22 causing the accident. But the settlement agreements' unambiguous language reflects that the
23 Laws did intend to extinguish Zemke's liability, whatever that liability may have been. In section
24 2.3 of the agreements, the Laws agreed "as a material part" of the settlement that the payment
25 made by the CW Defendants "fully extinguishes the liability of each and every party, tortfeasor,
26 joint tortfeasor, potential tortfeasor and third-party defendant that is named or that could have
27 been named" in this lawsuit. (Dkt. #467-6 at 3; Dkt. #467-7 at 3.) Zemke is a named third-party
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1 defendant in this lawsuit (and he was at the time the Laws signed the settlement agreements), so
2 the agreements specifically referred to him even if not by name. Additionally, the Laws agreed
3 that “nothing in this Agreement shall be construed to limit, preclude or extinguish any
4 contribution or equitable indemnity claim that has been or may be pursued by the CW Parties in
5 connection with” this lawsuit. (*Id.*) This was not “boilerplate” release language like that at issue
6 in *Russ*. 906 P.2d at 719 (releasing the other driver in a car accident and his wife and “all other
7 persons, firms, and corporations . . .”). Instead, the Laws’ release language referred specifically
8 to parties in the pending lawsuit by their capacities in the suit as opposed to by name. By the
9 agreements’ unambiguous language, the settling parties intended to extinguish Zemke’s liability
10 as a third party defendant and to preserve the CW Defendants’ contribution claim against him. I
11 therefore deny Zemke’s motion on this basis.

12 3. *Fair Share*

13 Zemke argues that because the CW Defendants asserted comparative negligence and
14 requested a finding of several liability as affirmative defenses in this action, the CW Defendants
15 released only their own liability in the settlement and thus did not pay more than their fair share.
16 The CW Defendants respond that pleading the affirmative defense of comparative negligence
17 does not mean they have abandoned a contribution claim once they settle with the original
18 plaintiff. The CW Defendants also argue Zemke presents no evidence that the CW Defendants
19 paid only their fair share.

20 Zemke cites no authority for the proposition that where a defendant asserts the affirmative
21 defense of comparative negligence and requests that several liability be determined, the defendant
22 forfeits a contribution claim once that defendant settles with the injured party. Zemke’s proposed
23 result would undermine the Nevada Legislature’s policy aim of promoting settlements among
24 joint defendants. *Otak Nevada, L.L.C.*, 312 P.3d at 498. Because a trier of fact has not yet
25 determined who caused or contributed to the accident, or the relative liability of any of the
26 participants, Zemke has not met his initial burden of showing he is entitled to judgment as a
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1 matter of law on the basis that the CW Defendants paid only their fair share. I therefore deny
2 summary judgment on this basis.

3 **B. Equitable Indemnity**

4 Zemke argues he is entitled to summary judgment on the CW Defendants' equitable
5 indemnity claim because the CW Defendants committed independent wrongs and they have
6 presented no evidence that Zemke had a prior legal relationship with, or owed a duty to protect,
7 them. The CW Defendants respond that issues of fact remain about who caused or contributed to
8 the accident.

9 Equitable indemnity "allows a defendant to seek recovery from other potential tortfeasors"
10 only when a defendant "who has committed no independent wrong, is held liable for the loss of a
11 plaintiff caused by another party." *Pack v. LaTourette*, 277 P.3d 1246, 1248-49 (Nev. 2012)
12 (quotation omitted). Equitable indemnity "is not usually available between joint tortfeasors."
13 *Black & Decker (U.S.), Inc. v. Essex Grp., Inc.*, 775 P.2d 698, 699 (Nev. 1989). However, an
14 exception to this rule exists where there is a "preexisting legal relation" between the joint
15 tortfeasors, or the primary tortfeasor has "some duty . . . to protect the secondary tortfeasor."
16 *Pack*, 277 P.3d at 1249 (quotation omitted); *Black & Decker*, 775 P.2d at 699-700 (holding an
17 implied warranty of merchantability created a duty supporting an equitable indemnity claim).
18 Even under this exception, if a party is "actively negligent," it "has no right to indemnity from
19 other tortfeasors." *Pack*, 277 P.3d at 1249.

20 It has not yet been determined whether the CW Defendants and Zemke are joint
21 tortfeasors or whether the CW Defendants committed an independent wrong because issues of
22 fact remain as to who caused the accident. (Dkt. #445); *see also Cent. Tel. Co. v. Fixtures Mfg.*
23 *Corp.*, 738 P.2d 510, 512 (Nev. 1987) ("A trier of fact must decide if Central Telephone is
24 negligent; Central Telephone cannot be a concurrent tortfeasor unless it is found to be
25 negligent."). In his current motion, Zemke has not established as a matter of law that the CW
26 Defendants are joint tortfeasors or that they committed an independent wrong precluding
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1 indemnity. I therefore deny Zemke's motion for summary judgment on the CW Defendants'
2 equitable contribution claim.

3 C. Conflict of Interest

4 Finally, Zemke contends that the CW Defendants have an inherent conflict of interest in
5 asserting contribution and equitable indemnity claims because the CW Defendants have denied
6 they caused the accident but their contribution and indemnity claims require them to prove they
7 contributed to the accident. The CW Defendants respond that Federal Rule of Civil Procedure 14
8 allows a defendant to bring a third party complaint for contribution without first admitting that it
9 is liable to the plaintiff.

10 Parties are entitled to plead in the alternative. *See* Fed. R. Civ. P. 8(d)(3) ("A party may
11 state as many separate claims or defenses as it has, regardless of consistency."). Thus, the CW
12 Defendants may simultaneously deny liability while also asserting claims for contribution or
13 equitable indemnity in the event a jury reaches a different conclusion.² This is consistent with
14 Nevada law, which "recognize[s] that a third-party plaintiff has the right to seek contribution in
15 an original action prior to entry of judgment." *Pack*, 277 P.3d at 1249-50. Thus, the third party
16 plaintiff need not await a finding of liability in the original action to assert a contribution claim.

17 Zemke also argues that Rule 14(a) is an improper means to plead a contribution or
18 equitable indemnity claim, but the cases he cites do not support his position. *See, e.g., Watergate*
19 *Landmark Condo. Unit Owners' Ass'n v. Wiss, Janey, Elstner Assocs., Inc.*, 117 F.R.D. 576, 578
20 (E.D. Va. 1987) (offering both indemnity and contribution as examples of proper bases to support
21 a third party complaint under Rule 14). These cases generally state that for impleader to be
22 proper under Rule 14, the third party defendant's liability must be dependent on the outcome of
23 the original claim and "the third party claim must attempt to pass on to the third party all or part
24 of the liability of the defendant." *United States v. Bodenger*, No. CIV.A.03-272, 2003 WL

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26 ² Zemke also contends that the CW Defendants should be judicially estopped from taking
27 inconsistent positions. However, Zemke has not shown that a court has accepted one of the CW
28 Defendants' positions such that they should be estopped from asserting an inconsistent position. *See New Hampshire v. Maine*, 532 U.S. 742, 743 (2001).

1 22228517, at *4 (E.D. La. Sept. 25, 2003); *see also Watergate*, 117 F.R.D. at 578-79. As Zemke
2 acknowledges, “he is only liable to Defendant CWA if CWA is found responsible for the
3 accident.” (Dkt. #428 at 13 (emphasis omitted).) Thus, the CW Defendants’ claims against him
4 are dependent on the outcome of the original claim between the Laws and the CW Defendants,
5 and the CW Defendants’ claims against Zemke seek to pass on to Zemke all or part of the CW
6 Defendants’ liability. The CW Defendants’ contribution and indemnity claims therefore are
7 properly brought under Rule 14 as third party claims.

8 **D. Conclusion**

9 IT IS THEREFORE ORDERED that the CW Defendants’ motion to strike or alternatively
10 to file a sur-opposition (**Dkt. #477**) is **GRANTED in part as set forth above**, and I will not
11 consider the new arguments raised for the first time in Zemke’s reply brief. I will not strike the
12 reply brief from the record, however, so that the record is preserved for appeal purposes.

13 IT IS FURTHER ORDERED that third party defendant Mitchell Zemke’s motion for
14 leave to file excess pages (**Dkt. #475**) is **DENIED** because excess pages were used to raise new
15 issues.

16 IT IS FURTHER ORDERED that third party defendant Mitchell Zemke’s motion for
17 summary judgment (**Dkt. #428**) is **DENIED**.

18 DATED this 4th day of March, 2016.



19 ANDREW P. GORDON
20 UNITED STATES DISTRICT JUDGE
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